Supreme Court, U.S.
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No. 00-1564

In The

Supreme Court of the United States

JEFFREY N. MEHLER AND MARY S. RUSSELL,

Petitioners,

v.

THE TERMINIX INTERNATIONAL COMPANY, L.P.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the arbitration clause in the contract for pest control services signed by petitioner Jeffrey Mehler on July 19, 1996 apply to the actions that occurred during the application of the termiticide?

The Court below held that it did.

2. Was the particular arbitration clause contained in the contract for pest control services signed by petitioner Jeffrey Mehler on July 19, 1996 unconscionable?

The Court below held that it was not.

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STATEMENT OF THE CASE

Petitioners signed a valid contract containing an enforceable arbitration clause, they now regret that signature, and they are therefore asking this Court to protect them from their own actions by ignoring a long line of its own decisions and rewriting the seventy-five year old Federal Arbitration Act. They assert the absence of a contract where there is one, and they allege an unconscionability issue where there is none. There is nothing in the language of this arbitration clause or in the holding of the Second Circuit requiring action by this Court.

On Friday, July 19, 1996 petitioner Jeffrey Mehler, a "Registered Investment Advisor" specializing in financial planning and money management (App. 82), signed a contract for termite control services (App. 42-45). Language immediately above the line containing his signature (App. 42) informed Mr. Mehler that he could cancel the transaction at any time between then and midnight on the "third business day" (*i.e.*, five *calendar* days – until midnight on Wednesday, July 24, 1996); petitioner did not exercise that right. The "Terms and Conditions" section of the contract appears on the reverse of the side Mr. Mehler signed (App. 43). Section 8, captioned in bold upper case letters **ENTIRE AGREEMENT**, informed petitioner that the contract consisted of three components: a "Service Order" (under which Terminix would apply the termiticide products), a "Termite Protection Plan" (a warranty under which Terminix would provide the necessary service to protect the property against future termite damage), and an "Inspection Graph" (which detailed the precise locations of pre-existing termite damage that would not be covered by the warranty and showed where

and how the termiticide application called for in the Service Order would be conducted). Section 9, captioned in similar bold upper case letters **ARBITRATION**, contains the agreement of the parties that "any controversy or claim between them arising out of or relating to this agreement [*i.e.*, the "Entire Agreement" as described in Section 8] shall be settled exclusively by arbitration."

Once petitioners signed this contract, Terminix applied the termiticide at their property on July 19 and July 26, 1996. During one of those applications the technician's drill apparently punctured the fuel oil return line located under the basement slab; over the next seven months approximately 800 gallons of fuel oil leaked into the soil beneath the house. On or about July 30, 1996 petitioners made the single $1500 combined payment to reflect their purchase of the termiticide applications (performed pursuant to the Service Order and Inspection Graph) and the warranty against future termite attacks (to be performed under the Termite Protection Plan). Terminix subsequently sent them an additional document known as a "Termite Guarantee" (App. 47) which confirmed that the warranty against future termite damage became effective as of August 1, 1996.

REASONS FOR DENYING THE PETITION

The Second Circuit correctly found that the arbitration agreement, by its own terms, clearly applies to disputes arising out of and relating to the application of the termiticide pursuant to the Service Order. Although the Second Circuit did not specifically address the unconscionability issues raised in the petition, those claims are entirely without merit. The Second Circuit's decision is not in conflict with rulings of this Court or other circuits.

I. THE ARBITRATION CLAUSE APPLIES TO THE CLAIM OR CONTROVERSY AT ISSUE HERE

The puncture of the fuel oil return line occurred during the application of the termiticide. That application was conducted pursuant to the Service Order and the Inspection Graph. Under Section 8 of the contract that Mr. Mehler signed on July 19, the Service Order and Inspection Graph are components of the "Entire Agreement" for pest control services between the parties. Under Section 9, any dispute arising out of or relating to the Service Order or the Inspection Graph is to be settled by arbitration.

In their attempt to avoid arbitration petitioners focus exclusively, and erroneously, on language in the "Termite Guarantee" (App. 47) to the effect that the *warranty* against future termite damage "begins 08-01-96"; they argue incorrectly that despite its clear wording the arbitration clause in the July 19 contract applies *only* to

disputes arising under the warranty. This argument is inconsistent with the plain and unequivocal language of Sections 8 and 9 of the signed contract that the "Service Order *signed at the time of purchase*" is part of "the entire agreement between the parties" and that "any controversy or claim arising out of or relating to" that agreement is to be "settled exclusively by arbitration." (Emphasis added.) The "Termite Guarantee" itself contains no signatures; it directs petitioners to "[s]ee your Termite Protection Plan for additional conditions and limitations" (which are incorporated into the Guarantee by reference) and pointedly notes that the provisions of the Plan "shall control in the event of any conflict with *this summary*." (App. 47) (emphasis added.) The August 1, 1996 date referenced in the Termite Guarantee reflects the fact that the warranty component of the July 19, 1996 contract could not have become effective until (1) Terminix had applied the termiticide and (2) the customer had made the appropriate payment, the specific dates of which could not have been known to or by either party on July 19th.[1] The arbitration clause by its terms is not limited to the warranty but in fact applies to *any*

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[1] Those two elements are conditions precedent to the validity of the warranty against future termite damage. (*See* the "Note To Customer" in the upper right corner of the first page of the July 19 contract, App. 42.) Petitioners' brief acknowledges that the "Termite Protection Plan [*i.e.*, the warranty] states specifically that *it* goes into effect 'upon completion' of the work." (Br. 12, emphasis added.)

controversy or claim "arising out of or relating to" any individual component of the July 19, 1996 contract, specifically including the Service Order.[2]

The Second Circuit interpreted the July 19 contract consistently with Connecticut law. The Connecticut Supreme Court has addressed that issue definitively.

> A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . The intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . *the language used must be accorded its common, natural, and ordinary meaning and usage* where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and ambiguous, the contract is to be given effect according to its terms. *A court will not torture words to import ambiguity* where the ordinary meaning leaves no room for ambiguity. . . . Similarly, *any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms.*

24 Leggett Street Ltd. P'ship v. Beacon Indus., 239 Conn. 284, 294-95, 685 A.2d 305 (1996) (citations and internal quotation marks omitted, emphasis added). The Second Circuit followed this guidance in construing the parties' intent

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[2] As the Second Circuit noted, petitioners' complaint itself "repeatedly" alleges that the puncture occurred while Terminix was "performing work under the contract" or "in connection with the termite control contract." (App. 9.)

through the terms of the contract and in light of the circumstances. Contrary to petitioners' argument, therefore, it is clear that the Second Circuit, rather than applying a "results oriented" analysis to justify its "presumption" in favor of arbitration, actually construed the terms of the contract in strict accordance with Connecticut law and *precisely* as the parties executed it. This was the question before it, and it reached the correct conclusion. "Our reading of the Agreement leads us to conclude that it constitutes a unified contract for extermination and continual protection, encompassing all aspects of the services, beginning on July 19, provided by Terminix to the plaintiffs." (App. 8.) Petitioners' arguments that in so concluding the Second Circuit somehow "infringed upon traditional state powers" or "preempted general principles of state contract law" fall of their own weight. The decision below raises no issue of "covert" or "overt" preemption of state contract law by the federal judiciary and requires no review by this Court.

II. THE USE OF THE ARBITRATION CLAUSE AT ISSUE HERE IS NOT UNCONSCIONABLE.

For over seventy-five years federal law has strongly proclaimed and encouraged the right of parties to resolve disputes through arbitration as an alternative to costly and time consuming judicial proceedings.[3] Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, spells out

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[3] The Federal Arbitration Act was originally enacted in 1925, 43 Stat. 883, and was recodified in its present form as U.S. Code Title 9 in 1947.

this clear and unequivocal Congressional intent: "A written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable. . . . " This Court has held that Section 2 "is a congressional declaration of a liberal federal policy favoring arbitration agreements," and has noted with approval that the Courts of Appeals have "consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). This Court has repeatedly and consistently upheld the use of arbitration, most recently in *Circuit City Stores, Inc. v. Adams*, ___ U.S. ___, 121 S. Ct. 1302 (2001) and *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). The only Congressional restraint on this otherwise broad presumption in favor of arbitration occurs if there are grounds "at law or in equity for the revocation of any contract," 9 U.S.C. § 2, but petitioners have failed to establish any such grounds here.

A. Unconscionability

Unconscionability is an equitable concept that may be used by courts to preclude enforcement of "harsh and unreasonable contract terms." *Leasing Serv. Corp. v. Justice*, 673 F.2d 70, 71 (2d Cir. 1982). The classic definition of an unconscionable contract is one which "no man in his senses and not under delusion would make on the one hand, and . . . no honest and fair man would accept on the other." *Doctor's Assocs., Inc. v. Jabush*, 89 F.3d 109, 113 (2d Cir. 1996) (quoting *Hume v. United States*, 132 U.S. 406,

411 (1889)) (internal quotation marks omitted). "Unconscionability is determined by reference to the relative benefit of the bargain to the parties at the time of its making, the nature of the methods employed in negotiating it, and the relative bargaining power of the parties." *United States v. Bedford Assocs.*, 657 F.2d 1300, 1313 (2d Cir. 1981). The purpose of the doctrine is to prevent "unfair surprise and oppression." *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (2d Cir. 1984). The courts have held that there is "nothing inherently unfair or oppressive about arbitration clauses." *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986). Here, petitioners allege three grounds for holding the arbitration clause unconscionable: failure to disclose that they were giving up their right to a jury trial, failure to disclose "steep" arbitration fees, and limitation of the "claims and remedies available to them" in arbitration. None of these allegations supports a claim of unconscionability.

1. The Right To A Jury Trial.

This Court has long recognized that the Constitution does not confer an absolute right to have every claim heard before an Article III court, and that a party may agree to have a dispute determined another forum. *CFTC v. Schor*, 478 U.S. 833, 848-49 (1986).[4] Relying on that holding, the Seventh Circuit recently reiterated that fundamental principle: "[Plaintiff] argues that the arbitration agreement violates her Seventh Amendment right to

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[4] Although *Schor* involves a non-judicial CFTC "reparations proceeding" rather than an arbitration, the principle articulated by this Court is the same.

a trial by jury, but the law is clear that there is no constitutional right to a jury trial outside of an Article III forum." *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir.), *cert. denied*, 528 U.S. 811 (1999). Where the claims are properly before an arbitral forum, the jury trial right is extinguished. "In a non-Article III forum the Seventh Amendment simply does not apply." *Geldermann, Inc. v. CFTC*, 836 F.2d 310, 323 (7th Cir. 1987).

Petitioner Jeffrey Mehler is a "Registered Investment Advisor" whose business is financial planning and money management. He is a sophisticated and experienced business person who is fully capable of reading a contract, understanding its terms, and making an informed decision. It is well known in the financial industry that brokerage houses make widespread use of arbitration clauses. The arbitration clause contained in Section 9 of the contract not only stated that the parties were agreeing to submit their disputes to arbitration but also pointed out that "[n]either party shall sue the other where the basis of the suit is this agreement. . . . " This language is clear and unambiguous and makes it plain to any reader, regardless of the level of sophistication, that the parties to the contract are agreeing to shift the locus for their disputes from a judicial to an arbitral forum. "[T]hough *perhaps* not contemplated by the Piersons when they signed the contract, loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." *Pierson*, 742 F.2d at 339. Moreover, "absent a showing of fraud or mental incompetence, a person who signs a contract cannot avoid h[is] obligations under it by showing that [ ]he did not read what

[ ]he signed." *Coleman*, 802 F.2d at 1352 (citing *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 140 (7th Cir. 1985)).

There is nothing in the Terminix contract as a whole, or the standard arbitration clause in particular, hidden or unduly complicated. The "Service Order" and the "Termite Protection Plan" components of the written contract consist of a total of two pages with all the sections, including the arbitration clause, introduced by identically sized bold headings. The text of each individual section is printed in identically sized type. As noted above, the petitioners were in a position to fully understand what they were signing. Nothing was hidden from them and in reality the arbitration agreement is of some benefit to them. As this Court has observed, by agreeing to arbitrate a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

There is nothing about the instant agreement to use a non-judicial forum to resolve disputes that in any way distinguishes it from those involved in *Schor* or *Mitsubishi Motors, supra*, and the Second Circuit was correct in rejecting petitioners' claim of unconscionability on this issue.

2. The Costs of Arbitration.

Section 9 of the contract provides that the arbitration "shall be conducted in accordance with the Commercial

Arbitration Rules then in force of the American Arbitration Association [AAA]."[5] Terminix filed the demand for arbitration and paid the initial fee; petitioners will have to pay a filing fee only if they file a counterclaim, and under the AAA Rules[6] that fee will reflect a sliding scale based on the amount of their claim. Rule 51 provides that the AAA may defer or reduce its administrative fees "in the event of extreme hardship"; petitioners have already requested a fee waiver under this Rule "due to hardship."[7] (App. 80.) In addition, AAA Rule 52 allows the arbitrators to apportion the expenses of the proceeding to one party or the other.

It is obvious that petitioners will face fees and expenses regardless of whether they present their claims in a judicial or an arbitral forum. And as this Court has recognized, one of the advantages of arbitration is that it is faster and less costly than litigation:

> We agree that Congress, when enacting this law, had the needs of consumers, as well as others, in mind. See S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the Act, by *avoiding "the delay and expense of litigation,"* will appeal "to big business and little business alike, . . . corporate interests

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[5] If not already familiar with those Rules through his business as a Registered Investment Advisor, Mr. Mehler certainly had the opportunity during the contractual three business day "cooling off" period (App. 42) and at any time thereafter to obtain and read a copy.

[6] The AAA's 1999 Commercial Arbitration Rules are the ones currently "in force."

[7] AAA has deferred its ruling on this request pending the outcome of these judicial proceedings.

> [and] . . . individuals"). Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation. See, *e.g.*, H.R. Rep. No. 97-542, p. 13 (1982) ("The advantages of arbitration are many: *it is usually cheaper and faster than litigation*; it can have simpler procedural and evidentiary rules; . . . ").

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995), (emphasis added.) It is against this cost saving purpose of arbitration that we examine petitioners' claim that the failure of the contract to disclose the arbitration fees renders it unconscionable.

Petitioners suggest that this Court's holding in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, somehow supports their argument; the passage they quote from that decision, however, (Br. 19) is incomplete. The relevant text, in full, is as follows:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. As the Court of Appeals recognized, "we lack . . . information about how claimants fare under Green Tree's arbitration clause." *The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.*

Green Tree, 531 U.S. at 522 (citations omitted) (emphasis added). This Court went on to hold that a party seeking to invalidate an arbitration agreement on the basis of allegedly prohibitive costs "bears the burden of showing the likelihood of incurring such costs." Petitioners have not met that burden, and indeed, in view of their pending "hardship" fee waiver request under AAA Rule 51, they cannot meet it.

The Second Circuit's rejection of petitioners' unconscionability argument on this issue does not conflict with but in fact mirrors this Court's decision in *Green Tree*. Nor is the Second Circuit's holding in conflict with three circuit court decisions cited by petitioners as calling for a different result here. Unlike the consumer situation here, all three cases (*Shankle v. B-G Maintenance Mgmt. of Colorado*, 163 F.3d 1230 (10th Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); and *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997)) involve situations where an *employee* was required, as a condition of employment, to agree to arbitrate any disputes with the employer. In both *Shankle* and *Cole* the arbitration agreements *by their terms* specifically *obligated* the employee to pay one-half of the cost of any arbitration proceeding, and on that basis the courts found the agreements to be unenforceable. In contrast, the arbitration agreement here, like the one in *Green Tree*, is silent on the question of costs and affords whichever party seeks arbitration the protections of AAA Rules 51 and 52. In *Paladino* the arbitration agreement did not address the payment of costs, and the Court found the agreement unenforceable on other grounds. *Dicta* in the concurring opinion suggests a potential additional ground: because

the employer "makes no promises to pay for an arbitrator, employees *may be liable* for at least" half the costs of arbitration. *Paladino*, 134 F.3d at 1062 (emphasis added). To the extent that petitioners believe the concurring opinion creates a conflict between the Second and Eleventh Circuits requiring resolution by this Court, Terminix submits that the *Green Tree* decision and the factual distinctions between the cases make this unnecessary.

The fact that there are costs involved in pursuing arbitration, and that the contract did not disclose those costs, does not render it unconscionable. The Second Circuit's decision is correct and should not be reexamined by this Court.

3. The Limitation On Claims and Remedies.

Section 5 of the contract (App. 43), captioned in the same bold upper case letters used for Sections 8 and 9, provides in upper case letters in Subsection D as follows:

> **5. DISCLAIMER.**
>
> D. TERMINIX DISCLAIMS ANY LIABILITY FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES. THE GUARANTEES STATED IN THIS AGREEMENT ARE GIVEN IN LIEU OF ANY OTHER GUARANTEES OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

Section 9 of the contract, reflecting the disclaimer language of Section 5, provides that neither party "shall be liable to the other for indirect, special or consequential

damages or loss of anticipated profits." (App. 43.) Petitioners assert that this limitation on liability renders the arbitration clause unconscionable. They are wrong.

This Court's FAA decisions have long recognized the Act's "primary purpose of ensuring that private agreements to arbitrate are enforced *according to their terms.*" *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (emphasis added). That case involved a construction dispute governed by a contract containing a relatively standard arbitration clause. But there was an interesting twist: another section of the contract contained a choice-of-law clause reflecting the parties' agreement that the contract would be governed "by the law of the place where the Project is located," that is, California. And California's arbitration law, unlike the FAA, allows a court to stay arbitration while related judicial proceedings are pending. The University Trustees obtained a stay of the arbitration under the California law over Volt's objection that the FAA preempted that provision. The California Supreme Court declined to review the decision of the state Court of Appeals affirming the stay, but this Court then agreed to consider it.

In an opinion by the Chief Justice, and relying on its earlier holding in *Mitsubishi Motors*, 473 U.S. at 628, that the FAA "does [not] prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement," *Volt*, 489 U.S. at 478, this Court definitively resolved the question of the enforceability of arbitration terms as the parties have drafted them:

> But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, *and parties are generally free to structure their arbitration agreements as they see fit.* Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted. . . . By permitting the courts to "rigorously enforce" such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA.

Id. at 479 (citations omitted) (emphasis added). *See also, Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) ("[N]o claim is made that Prima Paint ever intended that 'legal' issues relating to the contract be excluded from arbitration, *or that it was not entirely free so to contract.*") (Emphasis added.)

The message, then, is clear: parties are generally free to structure their arbitration agreements to include or exclude whatever claims or terms they desire. Here the contract contained a disclaimer of certain damages and the arbitration clause reflected that fact. Jeffrey Mehler signed the contract and is as bound by its terms as is Terminix.

Petitioners cite two circuit court decisions in support of their argument that the contract is unconscionable

because of the limitation on certain damage claims; neither is helpful, however. *Parrett v. City of Connersville*, 737 F.2d 690 (7th Cir. 1984), *cert. denied*, 469 U.S. 1145 (1985), involved a claim by a police officer who had been transferred from the detective division to the uniformed division and then contended that he was subsequently constructively and wrongfully discharged. The collective bargaining agreement between the city and the police union provided for a grievance procedure before an arbitrator; Mr. Parrett went through that procedure but the arbitrator ruled that he would not consider any evidence or information that arose after the date of Mr. Parrett's transfer to the uniformed division. The Seventh Circuit found that while the grievance procedure was in general adequate, "the particular proceeding in this case did not, in fact, satisfy those [due process] requirements." *Parrett*, 737 F.2d at 697. Contrary to the assertion in petitioners' brief (Br. 25) that *Parrett* stands for the proposition that "arbitration offends due process" when an arbitrator cannot award "full common law damages," the Seventh Circuit actually held:

> The problem here is not that union grievance machinery . . . is inherently inadequate, for it is not, but that as administered in the present case it could not protect the plaintiff's property right in his job as a police officer. *This is not to say that arbitration cannot satisfy the requirements of due process unless the arbitrator is empowered to award full common law damages.* But if he cannot, then he must be able to prevent the harm to the grievant before it occurs, which requires faster action than was taken by the arbitrator in this case.

Parrett, 737 F.2d at 697 (emphasis added). The police officer's rights in his job were protected by due process because the job had aspects of "property" and the employer was a public entity. The due process issue simply does not exist here, however, because petitioners have no property right in the manner of dispute resolution under the contract; the rights that the parties have here are limited to the ones spelled out in the contract. There is thus no conflict between the decisions of the Second and Seventh Circuits on this issue.

Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244 (9th Cir. 1994), considered the question – not present here – of whether parties can contractually reduce a statute of limitations and other rights contained in a remedial statute specifically enacted to redress the perceived unequal bargaining relationship between petroleum distributors and retail dealers. The Ninth Circuit found that Congress had enacted the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. §§ 2801-2806, to deal with the "disparity of bargaining power" between petroleum franchisers and franchisees. The Act specifically spelled out the forms of relief to which a franchisee like Graham Oil would be entitled if it proved certain claims, and it established a one year statute of limitations for the filing of such claims. The parties in *Graham* entered into a franchise agreement that contained an arbitration clause that, among other things, eliminated some of the damages otherwise allowed by the PMPA and provided that claims would have to be filed within 90 days. The district court ruled that Graham Oil was limited exclusively to the arbitration proceeding, but the Ninth Circuit reversed. It agreed that PMPA did not preclude the use of arbitration,

but held that because the "arbitration clause employed by ARCO compels Graham Oil to surrender important statutorily-mandated rights afforded franchisees by the PMPA," it was not enforceable. *Graham*, 43 F.3d at 1248. The situation in *Graham* is totally different and easily distinguishable from the arbitration clause at issue here, and there is no conflict between the circuits as a result.

CONCLUSION

The Second Circuit correctly found that the parties entered into a valid contract containing an enforceable arbitration clause that applies to the dispute at issue. The arbitration clause is well within the parameters that this Court has consistently upheld. There are no conflicts between the Second Circuit's ruling and any decisions of this Court or the circuit courts. For the foregoing reasons the petition for a writ of certiorari should in all respects be denied.

Dated: Hartford, CT, May 10, 2001

Respectfully submitted,

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